STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 31, 2009
v	No. 282018 Oakland Circuit Court
EDWARD LAMONT ADAMS, Defendant-Appellant.	LC No. 2007-216533-FH

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 3 to 40 years for each of his possession with intent to deliver convictions, 2 to 10 years for his felon in possession of a firearm conviction and two years for each of his felony-firearm convictions. We affirm.

On July 18, 2007, police executed a search warrant at 125 Mary Day Street in Pontiac. As police approached, they observed defendant standing on a small porch on the east side of the residence; defendant was holding a clear plastic bag containing a white substance believed to be cocaine. As police officers yelled at defendant to "get down," defendant's eyes widened and he opened his mouth in apparent surprise before retreating inside and slamming the door. Police officers entering the east side of the residence observed defendant lying on the floor of the bedroom with his hand underneath the bed. Defendant was detained, as were two other adult females present inside the dwelling. A plastic bag was recovered from underneath the bed, in the area where defendant's hand was observed. The bag contained nine "corner ties" of crack cocaine and six "corner ties" of heroin packaged in a manner ready for sale.[1] Police also recovered a digital scale and a safety pin, each bearing visible traces of cocaine residue, from the

[1] Officer Joseph Marougi testified that, to package drugs in "corner ties" for sale, dealers will "put narcotics inside the plastic baggy, it goes to the corner, a knot [][is] formed and then they rip off the extra package of the baggy . . ."

top of a television set in the bedroom, and they recovered a loaded handgun from under the mattress. Elsewhere in the residence, police located a box of plastic bags and portions of plastic bags with their corners removed.[2] At the time of his arrest, defendant's wallet contained $1,556 in cash, comprised mostly of $20 bills. No paraphernalia for ingesting illegal substances was present in the residence or in the vehicles or on the persons of those present there. While defendant's name was not on the lease for the premises and his driver's license listed a different address as his residence, male clothing consistent with defendant's size was observed "laying out" in the bedroom in which defendant was detained, and defendant had a key to the premises in the front pocket of his pants.

Defendant's trial strategy was to attempt to establish that the drugs found by police under the bed were not his and that he had no knowledge of their existence or origin. On appeal, defendant argues that he was denied the effective assistance of counsel because, by asking a police officer whether he had observed defendant sell drugs prior to execution of the search warrant, defendant's trial counsel "opened the door to testimony that guaranteed that [defendant] would be convicted" of the drug offenses with which he was charged. We agree with defendant that defense counsel erred by questioning the officer in this regard. However, having reviewed the record and having given due consideration to the overwhelming evidence against defendant, we do not find that it is reasonably probable that the erroneous question and resulting testimony affected the outcome of defendant's trial. Therefore, reversal of defendant's conviction is not warranted.

"To establish a claim of ineffective assistance of counsel, a defendant must demonstrate [both] that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, *and* that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007), citing *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis added). See also, *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defense counsel admittedly erred by asking police officer Charles Janczarek whether he had observed defendant sell drugs; Janczarek indicated that he had. At the conclusion of her cross-examination, defense counsel explained, outside the presence of the jury, that she incorrectly remembered Janczarek answering the same question in the negative at defendant's preliminary examination. Following defense counsel's question at trial, Janczarek went on to testify, during redirect examination by the prosecutor, that he had observed defendant sell drugs to a confidential police informant on three occasions in the month prior to execution of the search warrant, and most recently 48 hours prior to the raid. Certainly, defense counsel's question was not trial strategy; her admitted error permitted the prosecution to introduce evidence of defendant's prior drug sales without disclosing the identity of its confidential

[2] Marougi also testified that, because of the manner in which drugs are packaged for sale, when searching locations used for distribution, police will find bags with missing corners, whereas when searching locations where personal use is occurring, police will find empty corners of such bags.

informant.[3] Thus, we agree with defendant that, with respect to this matter, defense counsel's representation was deficient. However, we conclude that, considering the overwhelming evidence establishing defendant's intent to distribute the cocaine and heroin observed in his possession, defense counsel's performance at trial did not prejudice defendant, and thus, did not violate his Sixth Amendment right to the effective assistance of counsel.

Defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, possession with intent to deliver less than 50 grams of heroin, felon in possession of a firearm, and three counts of felony-firearm. "The element of knowing possession with intent to deliver has two components: possession and intent." *People v Brown*, 279 Mich App 116, 136; 755 NW2d 664 (2008) (citing *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992)). "Actual physical possession is not required to meet the possession element." *Wolfe, supra* at 519-520. Instead, possession may be either actual or constructive. *Brown, supra* at 136 (citing *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000)); see, also, *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Constructive possession of [a controlled] substance signifies knowledge of its presence, knowledge of its character, and the right to control it. *Brown, supra* at 136.

Testimony established that: (1) defendant possessed a clear plastic bag later determined to contain cocaine and heroin packaged for distribution; (2) the large number of $20 bills found in defendant's wallet was indicative of distribution because drug dealers often sell "[$20] rocks"; and (3) the presence of plastic bags with corners missing in the residence was indicative of distribution because it was consistent with the packaging of narcotics in "corner ties" for sale. Additionally, at the time of his arrest, defendant's wallet contained pay stubs reflecting earnings of $7.50 per hour for workweeks totaling less than 40 hours, and a "Bridge Card," issued in defendant's name indicating his apparent eligibility for welfare benefits. Thus, defendant's documented sources of income did not substantiate the amount of cash found in his pocket, or the presence at the scene of three vehicles registered in defendant's name. In addition, the digital scale and safety pin were both evidence that defendant was packaging narcotics for distribution, rather than possessing them for personal use,[4] as was the absence of any paraphernalia consistent with drug use on the premises or in any of defendant's vehicles.

Even without Officer Janczarek's testimony that he had previously witnessed defendant sell drugs to a police informant, substantial circumstantial evidence established defendant's knowledge of and intent to distribute the controlled substances observed in his possession as police approached the residence and ultimately found under the bed in the vicinity where

[3] As the prosecution points out, evidence of defendant's controlled sales was admissible pursuant to MRE 403(b). At the time of defense counsel's question, however, the prosecution had not attempted to introduce it, having seemingly made the strategic decision to instead proceed without this evidence in order to avoid "burning" the confidential informant's identity as would be necessary to do so.

[4] Officer Janczarek testified that after powdered cocaine is cooked, it is transformed into a "rock" of "crack cocaine," and drug dealers use a safety pin to break the larger rock into smaller rocks, which are then sold by weight.

defendant was detained. Therefore, notwithstanding defense counsel's error, it is not "reasonably probable" that the jury would have acquitted defendant had Janczarek's testimony not been provided.

Defendant does not challenge his convictions for felony-firearm or felon in possession of a firearm directly on appeal. Nor is there any basis in the record for him to do so. "To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original). "A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him . . .. [T]he possession requirement of the felony-firearm statute has been described in terms of ready accessibility." *Id.* at 437 (citations omitted). As noted above, police discovered a loaded handgun under the mattress, within approximately 18 inches of defendant, who was found on the floor at the foot of the bed. Given his proximity to it, defendant could have reasonably accessed the firearm at his own discretion. See *Id.* Thus, the prosecution having established the elements of possession with intent to deliver controlled substances, there was ample evidence to permit the jury to conclude that defendant contemporaneously possessed the firearm found under the mattress. And, the parties stipulated that defendant was previously convicted of a felony and, therefore, ineligible to lawfully possess a firearm. Therefore, the evidence amply supported the jury's verdicts on the firearm charges.

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra